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Supreme Court, U.S.
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In The
Supreme Court of the United States

Montana Rail Link, Inc.,
Petitioner,

v.

Robert R. Watts, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Montana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the test for determining "employment" under the Federal Employers' Liability Act [45 U.S.C. § 51 (1939)] should be judicially expanded to include the distinct congressional standard utilized for establishing "employment" under the Railroad Retirement Act [45 U.S.C. § 231 (1976)].

PARTIES TO THE PROCEEDING

This Petition for Certiorari is filed on behalf of Montana Rail Link, Inc., which is the Defendant/Appellee in six separate cases consolidated before the Sixth Judicial District Court in Park County, Montana and appealed to the Montana Supreme Court. Livingston Rebuild Center, Inc. is a Defendant/Appellee in the state court action.

The following six individuals are Respondents herein, and are the Plaintiffs/Appellants in the state court action:

Robert R. Watts, Danial K. Newman, Paul F. Nardella, Dennis A. Thorson, Danna Parrow and Jack Lowe.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Montana Rail Link, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Montana in *Robert R. Watts v. Montana Rail Link, Inc.*, published at 975 P.2d 283 (Mont. 1999).

OPINION BELOW

The February 8, 1999 opinion of the Montana Supreme Court is reported at 975 P.2d 283, and is reprinted in Appendix 1 to this Petition. Montana Rail Link's Petition for Rehearing was denied on April 22, 1999 and is reprinted at Appendix 2 to this Petition.

STATEMENT OF JURISDICTION

Plaintiffs (Respondents herein) filed complaints in the District Court for the Sixth Judicial District in Park County, Montana, in which they named Livingston Rebuild Center, Inc. (hereinafter "LRC") and Petitioner Montana Rail Link, Inc., (hereinafter "MRL") as defendants, seeking damages pursuant to the FELA, 45 U.S.C. §§ 51-60 (1939). The District Court entered judgment in favor of MRL on September 30, 1993 and is reprinted as Appendix 3 to this Petition.

The decision of the Montana Supreme Court was entered on February 8, 1999. On April 22, 1999, the Montana Supreme Court denied MRL's Petition for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The FELA is codified at 45 U.S.C. § 51-60. 45 U.S.C. § 51 of the Act provides in pertinent part:

Every common carrier by railroad while engaging in commerce between any of the several states...shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce...

The Railroad Retirement Act is codified at 45 U.S.C. § 231, specifically (a)(1)(ii) of that Act provides:

> For the purposes of this Act—
>
> (a)(1) The term "employer" shall include—
>
> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

STATEMENT OF THE CASE

In 1987 the Burlington Northern Railroad sold its railroad line between Laurel, Montana and Sandpoint, Idaho to Montana Rail Link, Inc. ("MRL").

On January 4, 1988, the Livingston Rebuild Center ("LRC") was incorporated under the laws of the state of Montana. In June 1988, LRC began its operations as an independent remanufacturing business at the Livingston yard in Livingston, Montana, which property was previously a part of Burlington Northern's operations. LRC was incorporated to operate as a contract repair facility, or "back shop" for refurbishing and repairing locomotives. At the time LRC was incorporated by some, but not all of the MRL shareholders.

No other remanufacturing companies in the United States were subject to liability under the FELA. [Tr. p. 1725, lines 5-14, p. 1726, lines 9-25, p. 1727, lines 1-15].

The Livingston yard had historically been used by the Burlington Northern for "running repairs" and for heavy repair or "back shop" work. The facility had been closed for several years prior to the commencement of LRC's operations in June 1988. MRL was not interested in obtaining, refurbishing or operating Burlington Northern's back shop facilities since MRL's business plan was to operate a railroad and not a contract repair facility. [Tr. p. 1554, lines 1-11, p. 1572, lines 3-25; p. 1959, lines 4-16]. As a practical matter, MRL also could not sustain a "back shop" operation because of its small fleet of only 54 locomotives at its inception. In fact, the Burlington Northern's Livingston back shops were not economically viable even with its fleet of some 200 locomotives.

LRC furnished services to numerous customers, including MRL, Burlington Northern, GMC, Helm, Cryoshield, Maryland Midland, Oxford Leasing, Kansas City Southern, Wisconsin Central and GTAX. [Tr. p. 207, line 1 through p. 209, line 2]. Services contracted for by MRL required LRC to win a competitive bid. [Tr. p. 1043, lines 3-25, p. 1044, lines 1-11]. The percentage of MRL revenues devoted to remanufacturing of MRL's locomotive fleet was zero in 1987 and 1988, 1.1663% in 1989, 1.51% in 1990, .3569% in 1991 and zero in 1992. *[See MRL's Trial Exhibit "II"].*

In 1989, LRC was found to be an employer within the meaning of the Railroad Retirement Act [45 U.S.C. § 231(a)(1)(1976)]. The finding that LRC was an "employer" under the Railroad Retirement Act ("RRA") was based upon a finding of "common control" since Dennis Washington was the majority shareholder of both LRC and MRL and the two companies had similar, although not identical, shareholders. The finding that LRC

was subject to the RRA was upheld in *Livingston Rebuild Center, Inc. v. R.R. Retirement Bd.*, 970 F.2d 295 (7th Cir. 1992). In these proceedings, the Montana Supreme Court held that the Railroad Retirement Board's ("RRB") ruling that LRC was under the "control" of MRL under 45 U.S.C. § 231(a)(1) [the RRA] was probative of the issue of whether the LRC employees were employees of MRL under the FELA. *[See App. 1, ¶s 29-33].*

The plaintiffs subsequently filed lawsuits against LRC and MRL in Montana state district court seeking damages under the FELA on the theory that LRC was a railroad or alternatively that they were employees of MRL. The claims were ultimately consolidated for purposes of determining whether the Court had jurisdiction under the FELA. Plaintiffs testified that they had been hired by and worked for LRC and not MRL. They also each acknowledged that their schedules were set by LRC, and that they could only be hired, fired and disciplined by LRC. [Tr. p. 374, lines 9-21, p. 248, lines 7-19]. Each of the Plaintiffs applied for state workers' compensation benefits and uniformly identified LRC as their employer to obtain such benefits. *[See MRL's Trial Exhibits "E(1)" and "F(1)"].*

The trial court, sitting without a jury, entered exhaustive findings of fact that LRC and MRL are separate, independent corporations with an arms-length customer relationship and ruled that LRC employees were not covered under the FELA. The Montana Supreme Court reversed the trial court, finding that the RRB's decision that LRC was an employer subject to the Railroad Retirement Act was probative for determining coverage under the FELA. Citing the RRB's decision, the court set aside the arms-length customer relationship and extended coverage under the FELA to LRC employees.

MRL now seeks this Court's review in determining whether the test for determining "employment" under the

FELA should be judicially expanded to include the distinct congressional standard utilized for establishing "employment" under the Railroad Retirement Act.

REASONS FOR GRANTING THE PETITION

I. THE MONTANA SUPREME COURT'S RELIANCE ON THE RAILROAD RETIREMENT BOARD'S DECISION TO DETERMINE COVERAGE UNDER THE FELA IS IN CONFLICT WITH THIS COURT'S DECISION IN *EDWARDS v. PACIFIC FRUIT EXPRESS CO.*, 390 U.S. 538 (1968).

To prove liability under the FELA, a plaintiff must establish the following four elements: (1) the defendant is a common carrier; (2) the plaintiff was employed by the defendant; (3) the plaintiff's injury occurred while employed by the defendant; and (4) the defendant's negligence caused plaintiff's injuries. *See Felton v. Southeastern Penn. Transp. Auth.*, 952 F.2d 59, 62 (3rd Cir. 1991). The specific issue before the trial court and the Montana Supreme Court was whether employees of LRC were employees of MRL for purposes of coverage under the FELA.

A. The seminal case for determining "employment" under the FELA is *Kelley v. Southern Pacific Company*, 419 U.S. 318, 324 (1975).

In *Kelley*, this Court set forth three methods by which a plaintiff can establish 'employment' with a rail carrier for FELA purposes even while he is nominally employed by

another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. *Id.* Second, he could be deemed to be acting for two masters simultaneously. *Id.* Finally, he could be a subservant of a company that was in turn a servant of a railroad. *Id.*

This Court requires more than a finding of a traditional agency relationship to satisfy the "while employed" clause of the FELA. *Id.* at 323. The historical standard has been proof of a master-servant relationship between the plaintiff and the defendant railroad. *Id.* In *Kelley*, this Court cited with approval Restatement Second of Agency § 220(2) for the factors helpful in determining whether a master-servant relationship exists. In analyzing the factors from § 220(2) for determining the existence of a subservant relationship, this Court concluded that the "control or right to control test would be met only if it were shown that the role of the second company was that of a conventional commonlaw subservant." *Id.* at 326.

In *Kelley*, the putative employee worked eight years for the Pacific Motor Trucking Co., a wholly owned subsidiary of the Southern Pacific Co. At the time of his injury, Kelley was unhooking automobiles from Southern Pacific's 'trilevel' auto-carrying flatcars. *Id.* at 321. Kelley alleged in his complaint that he was employed by the Southern Pacific railroad within the meaning of the FELA. *Id.* This Court reviewed the facts and found that the two companies were sufficiently distinct in organization and responsibility and that there was no apparent overlap in supervisory ranks. Importantly, there was no evidence that Southern Pacific's employees played a significant supervisory role in the unloading operation or that Kelley was being supervised by Southern Pacific employees at the time of his injury. *Id.* at 327.

This Court remanded the *Kelley* case to the District Court with instructions to apply the three-part test set forth

by this Court for determining whether the plaintiff was 'employed' by the railroad for purposes of FELA coverage. In reaching its conclusion, this Court cited with approval language from its earlier decision in *Standard Oil Co. v. Anderson*, 212 U.S. 215, 222 (1909) in which it emphasized the "importance of distinguishing between 'authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.'" *Id.* at 329.

The Montana Supreme Court applied the third part of the *Kelley* test and found that the employees were subservants of LRC which was, in turn, a servant of MRL. The court reversed the trial court's finding that MRL and LRC were independent corporations that maintained an arms-length customer relationship and instead held that the employees of LRC were 'employed' by MRL for purposes of FELA coverage.

B. The state court's reliance on the RRB's decision in determining the scope of FELA coverage conflicts with this Court's holding in *Edwards*, 390 U.S. 538.

In reaching its conclusion that LRC was a "dependent" corporation, the Montana Supreme Court relied on the Railroad Retirement Board's ("RRB") decision that LRC was an employer within the meaning of the Railroad Retirement Act ("RRA"). *See Livingston Rebuild Center, Inc. v. R.R. Retirement Bd.*, 970 F.2d 295 (7th Cir. 1992). In that decision, the Seventh Circuit cited the RRB's conclusion that "the Center is an 'employer' under the statutes [RRA] it administers because Dennis Washington, its principal investor, also is the controlling shareholder of Montana Rail Link..." *Id.* at 296. That court further noted that approximately 25% of LRC's business came from MRL and that the Center was "not a captive in the sense

that it is devoted predominantly to one railroad's needs..." *Id.*

The Montana Supreme Court then applied the RRB and the Seventh Circuit's upholding of that decision and judicially expanded, without any precedential support, the scope of FELA coverage to the same breadth of coverage which is congressionally established in the Railroad Retirement Act. However, as the Seventh Circuit noted in the *Livingston Rebuild Center* decision, "Congress defined a covered 'employer' broadly [under the RRA], including not only freight and passenger carriers but also 'any company which is directly or indirectly owned or controlled by, or under common control with, one or more [railroads] ..." *Id.* at 295. This Court should grant certiorari to review whether the scope of FELA coverage should be expanded to equal the broadly mandated scope of the RRA.

The Montana Supreme Court's reliance on the RRB's decision in determining whether the plaintiffs were "employees" under the FELA conflicts with this Court's holding in *Edwards*, 390 U.S. 538. In *Edwards*, defendant Pacific Fruit Express Company was subject to the RRA, however, this Court held that refrigerator car companies were specifically excluded from the terms of the FELA. *Id.* at 541. Consequently, the fact that the company was subject to the RRA was *not* found to be "probative" in any way when determining whether the company was an "employer" under the FELA. The Montana Supreme Court's reliance on the RRB's decision to determine the scope of FELA coverage thus stands in direct conflict with the *Edwards* decision.

II. THE MONTANA SUPREME COURT'S RELIANCE ON THE RAILROAD RETIREMENT BOARD'S DECISION TO DETERMINE COVERAGE UNDER THE FELA IS IN

CONFLICT WITH FEDERAL COURT DECISIONS HOLDING THAT THE BOARD'S FINDINGS ARE IRRELEVANT IN DETERMINING "EMPLOYMENT" UNDER 45 U.S.C. § 51.

The Montana Supreme Court's decision also conflicts with the federal district court's decision in *Griffin v. CSX Transportation, Inc.*, 1996 WL 535085 *2 (N.D. Ill. 1996) where the court held that evidence of the RRB's decision or that a company is subject to the RRA is "irrelevant" to the issue of determining "employment" under the FELA. While the *Griffin* Court correctly cited *Kelley* for the standard for determining employment under the FELA, it specifically held that evidence concerning Griffin's railroad retirement withholding was irrelevant to determining employment under the FELA. *Id.*

In *Carey v. CSX Transportation, Inc.*, 1995 WL 251145 *1, *2 (D. Md. 1995), plaintiff's employer CCSI was a wholly owned subsidiary of CSX Tech, which in turn was a wholly owned subsidiary of CSX Corporation. Plaintiff asserted that the fact that CCSI was required to make contributions under the RRA was evidence that she was in reality employed by CSX railroad for purposes of the FELA. The court opined that while the issue of RRB was "not unimportant," that fact *did not* address the core issue which governs determinations of FELA coverage. *Id.* at *2. The Montana Supreme Court's decision conflicts with *Carey* because the court did consider the RRB's decision as "probative" of the core issue governing determination of FELA coverage. Accordingly, this Court should grant certiorari to review whether the test for determining "employment" under the FELA for employees of a non-railroad entity owned by shareholders of a railroad should be judicially expanded to include the separate

congressional standard utilized for determining "employment" under the Railroad Retirement Act.

The federal district court in *Brankin v. CSX Transportation, Inc.*, 1996 WL 627625 (N.D. Ill. 1996), reached a similar conclusion as the *Carey* court. Brankin argued that CSXT's withholding of RRB taxes was evidence of his employment with CSX under the FELA. *Id.* at *4. However, the court ruled that CSXT's withholding of RRB taxes is not evidence which establishes the right to control for purposes of determining FELA coverage. *Id.* at *5. Importantly, the court correctly noted that the Railroad Retirement Act applies to *any company* under common ownership with a railroad and thus requires both railroad and non-railroad employees to pay railroad retirement taxes. *Id.* (Citing 45 U.S.C. § 231(a)(1)(ii) and *Edwards*, 390 U.S. 538 (1968)).

Furthermore, the Montana Supreme Court's adoption of the RRB's decision as "probative" evidence for determining FELA coverage conflicts with the Fourth Circuit's opinion in *Dixon v. CSX Transportation, Inc.*, 990 F.2d 1440 (4th Cir. 1993). The Plaintiff in *Dixon* introduced evidence that he was covered under the RRA and Railroad Unemployment Insurance. *Id.* at 1444. The Fourth Circuit, however, never addressed the issue of the RRB coverage in reaching its conclusion that Dixon was not employed by CSX at the time of the accident in question. *Id.* at 1448. The fact that the court *did not consider* evidence of Dixon's RRB coverage in reaching its decision highlights that the Montana Supreme Court's use of the RRB's decision as "probative" in determining the identical issue directly and irreconcilably conflicts with the Fourth Circuit Court of Appeals.

In addition to the clear conflict with the federal courts on the same issue, the Montana Supreme Court's adoption of the RRB's decision for determining employment under the FELA versus the standard evinced by this Court in

Kelley clearly broadens the scope of FELA coverage and makes every company that is obligated to pay benefits under the RRA subject to liability under the FELA regardless of whether the company is engaged in interstate commerce or a common carrier by rail under 45 U.S.C. § 51. The importance of uniformity in the test for determining who is covered under the FELA presents the special and important reason for the Court to grant the Petition. This Court should therefore grant certiorari to determine whether the RRB's decisions concerning employment under the RRA should be added to the test for determining employment under the FELA.

III. THE PRACTICAL EFFECT OF THE MONTANA SUPREME COURT'S RULING WARRANTS GRANTING CERTIORARI TO AVOID EXPANSION OF FELA COVERAGE BEYOND ITS CONGRESSIONAL MANDATE.

The practical effect of the Montana Supreme Court's ruling is that the parent company of every wholly owned subsidiary of a railroad, or company with common shareholders of a railroad, is now exposed to FELA liability for the employees of its non-railroad subsidiaries. The Montana Supreme Court appropriated a finding of "employment" under the Railroad Retirement Act, and applied that finding to a determination of "employment" under the FELA which resulted in an unprecedented expansion of FELA coverage. The result of the court's use of the RRA finding in the context of the FELA is to potentially subject every railroad in America with wholly owned subsidiaries to a plethora of FELA lawsuits from employees who are otherwise covered under their states' respective workers' compensation acts.

The Montana Supreme Court's decision is not based upon findings that the LRC employees' work was

controlled by MRL at the time of their injuries, or that their injuries even related to MRL projects. The trial record has a dearth of employment related control inferences. Rather, the Montana Supreme Court's decision is based primarily on common stock ownership.

The Montana Supreme Court's use of the RRB's decision and the injection of the standard for determining "employer" under the Railroad Retirement Act significantly expands the test for FELA coverage enunciated by this Court in *Kelley*. Therefore, in addition to exposing parent companies to FELA litigation which previously did not exist, the court's decision broadens the test for FELA coverage beyond that established by this Court. Certiorari is warranted to determine whether the scope of FELA coverage should be extended since:

> One of the purposes of the Federal Employers' Liability Act was to "create uniformity throughout the Union" with respect to railroads' financial responsibility for injuries to their employees.

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 493 n.5 (1980).

Public policy considerations also weigh heavily in favor of granting this petition for certiorari. Railroad companies and non-railroad entities alike throughout the United States rely upon the distinct standards for determining employment under the Railroad Retirement Act versus the FELA. However, if the Montana Supreme Court's decision stands uncorrected, the distinction between the two Acts is both eroded and blurred, thus creating additional exposure to railroad companies whose subsidiary corporation employees are currently covered by state workers' compensation acts.

MRL submits that this Court should be alert to extending a statute applicable to railroad employees engaged in interstate transportation to cover employees of non-railroad entities. Such an extension of the FELA based

upon a finding that a company is subject to the Railroad Retirement Act may only serve to deprive injured workers of their rights under a state compensation act where their right of recovery does not depend on proof of negligence. *See Turpin v. Chicago, Burlington & Quincy R.R. Co.*, 403 S.W.2d 233, 240 (Mo. 1966).

Finally, the Montana Supreme Court's improper use of the Railroad Retirement Act standard was recognized in the dissenting opinion signed by the Chief Justice Turnage and Justice Gray:

> [The Montana Supreme] Court attempts to buttress its opinion by the suggestion that the "common consideration of 'control'" contained in the non-applicable definition (of the RRA) is somehow relevant here. A comparison of the definition of control contained in the Railroad Retirement Act with the criteria contained in § 220 (2) of the Restatement (Second) of Agency reflects that the "control" elements are, indeed, significantly different. **Thus, the Court's inclusion of the opinion rendered by the Deputy General Counsel for the Railroad Retirement Board – in a different proceeding under a different definitional standard – that the LRC "is under common control with one or more railroad employers" *has no bearing here, either legally or factually.*** [See Appendix 1, ¶ 72]

CONCLUSION

Certiorari should be granted to resolve the conflict in determining the scope of FELA coverage between the

Montana Supreme Court and this Court and the federal courts deciding the same issue.

Respectfully submitted,

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